No. 87-1064

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP GEORGE STUART, SR., AND MONS KAPOOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM S. ROSE, JR.
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

CHARLES E. BROOKHART
JOHN A. DUDECK, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, in issuing an administrative summons pursuant to a request for information made by a tax treaty partner, the Commissioner of Internal Revenue is required to state that the foreign tax investigation has not reached a stage analogous to a domestic tax investigation's referral to the Justice Department for criminal prosecution.

TABLE OF CONTENTS

CONTENTS – Continued:

TABLE OF AUTHORITIES

Cases:

Cases – Continued:

Cases – Continued: Page

Constitution, treaties, statutes, and rule:

Statutes and rule – Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1064

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP GEORGE STUART, SR., AND MONS KAPOOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 813 F.2d 243. The enforcement orders of the district court (Pet. App. 25a-26a, 34a-35a) and the opinions of the magistrate (Pet. App. 27a-33a, 36a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a-23a) was entered on March 24, 1987. A petition for rehearing was denied on August 27, 1987 (Pet. App. 24a). On November 18, 1987, Justice O'Connor extended the time to petition for a writ of certiorari to and including December 24, 1987. The petition was filed on December 23, 1987, and was granted on May 2, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND TREATY INVOLVED

Articles XIX and XXI of the Convention Respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1405, 1406, and Section 7602 of the Internal Revenue Code are set out in the appendix (App., *infra,* 1a-4a).

STATEMENT

1. Section 7602(a) of the Internal Revenue Code[1] gives the Commissioner the authority to summon papers and witnesses for examination for the purpose of ascertaining tax liabilities. The district courts are empowered to enforce summonses upon a prima facie showing by the Commissioner that the summons was issued in "good faith," *i.e.*, in furtherance of a legitimate purpose authorized by Congress. I.R.C. § 7604; *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). Section 7602(c) of the Code, added by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 333(a), 96 Stat. 622, provides that a summons may not be issued when there is in effect a referral to the Justice Department for criminal prosecution.[2] Such a referral is defined by the statute as

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2] This requirement first arose out of this Court's decision in *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978). Construing the pre-TEFRA version of Section 7602, the Court there held (5-4) that the IRS may issue a summons as long as it has not made a Justice Department referral and has "not abandon[ed] in an institutional sense * * * the pursuit of civil tax determination or collection" (437 U.S. at 318). The dissenting Justices argued for a bright-line test turning entirely upon whether a recommendation for prosecution has already been made to the Justice Department (*id.* at 320-321 (Stewart, J., dissenting)). The TEFRA amendments essentially adopted the dissenting position. TEFRA also added Section 7602(b), which made explicit that an inquiry into the possibility that a criminal offense has been committed is a legitimate purpose for the issuance of a summons.

being in effect if (1) the IRS has recommended a grand jury investigation or prosecution to the Justice Department or (2) the Justice Department has requested otherwise confidential return information from the IRS for use in a criminal tax investigation (I.R.C. § 7602(c)(2)).

The United States has entered into tax treaties with other nations that provide, among other things, for the exchange of information to assist each other in administration of the tax laws. The information exchange agreement between the United States and Canada that is applicable to this case is found in Articles XIX and XXI of the Convention Respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1405, 1406 [hereinafter 1942 Convention]. Article XIX provides that, "[w]ith a view to the prevention of fiscal evasion," each country undertakes to furnish to the other "information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws" and that "may be of use * * * in the assessment of the taxes to which this Convention relates." Article XXI provides that, if the Canadian Minister "in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner [of Internal Revenue], the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States." These treaty provisions have been held to contemplate use of domestic summons enforcement procedures by the Commissioner of Internal Revenue to assist a treaty partner in a foreign tax investigation, even though no United States taxes are involved. See Pet. App. 7a; *United States* v. *A.L. Burbank & Co.*, 525 F.2d 9 (2d Cir. 1975), cert. denied, 426 U.S. 934 (1976).[3]

[3] A new Income Tax Convention between the United States and Canada became effective after the issuance of the summonses involved

2. Respondents are citizens and residents of Canada who have bank accounts with the Northwestern Commercial Bank in Bellingham, Washington. The Canadian Department of National Revenue (Revenue Canada)—the Canadian equivalent to the Internal Revenue Service (IRS)—is attempting to determine respondents' income tax liabilities under Canadian law for tax years 1980, 1981, and 1982. Revenue Canada, acting pursuant to the 1942 Convention, requested in January 1984 that the IRS obtain and provide bank records necessary to the determination of respondents' Canadian tax liabilities for the years in question. Pet. App. 2a.

Thomas J. Clancy, IRS Director of Foreign Operations, was at that time the "competent authority" (see art. XIX) for the United States with respect to such tax treaty information requests.[4] Director Clancy determined that the Canadian requests for information were within the scope of the treaty and that it was appropriate for the United States to honor the requests. Accordingly, on April 2, 1984, the IRS served on Northwestern Commercial Bank administrative summonses (see J.A. 21) for the requested information . Pet. App. 2a-3a.

3. Pursuant to Section 7609(a) of the Code, respondents received notice of the summonses, and they directed the bank not to comply. Respondents then each invoked their rights under Section 7609(b)(2) by petitioning the

---

in this case (see 1 Tax Treaties (CCH) ¶ 1301 (1984)). Article XXVII of the new Convention (¶ 1317k), effective with respect to taxes for taxable years beginning on or after January 1, 1985, contains language relating to exchange of information that is essentially indistinguishable from the language contained in Articles XIX and XXI of the 1942 Convention.

[4] The "competent authority" is defined by the protocol accompanying the 1942 Convention as "the Commissioner and the Minister and their duly authorized representatives." 1 Tax Treaties (CCH) ¶ 1233 (1984).

United States District Court for the Western District of Washington to quash the summonses. Respondents raised three claims: (1) the summonses were not issued for lawful purposes; (2) the summonses did not seek information relevant to any inquiry concerning an internal revenue tax of the United States; and (3) the information sought could be obtained directly by Revenue Canada under Canadian law. See J.A. 18-20.

The United States filed oppositions to the petitions to quash, together with motions for summary enforcement, and supported those filings with affidavits from Director Clancy, the "competent authority" (see J.A. 22-29). Director Clancy declared that he had decided to honor the Canadian requests and to issue the summonses because he had concluded that: (1) the requested information may be relevant in determining respondents' tax liability; (2) the same type of information can be obtained by Canadian tax authorities under Canadian law; and (3) the information requested was not already in the possession of the IRS. Director Clancy also declared that Revenue Canada had requested the information to determine the correct tax liabilities of respondents pursuant to a "criminal investigation, preliminary stage" and that he had determined that Revenue Canada's requests were within the scope of the treaty. Pet. App. 2a-3a; J.A. 27-29.

A magistrate held a consolidated hearing on the two petitions to quash and recommended that the district court enforce both of the summonses (Pet. App. 27a-33a, 36a-42a). Over respondents' objections to the magistrate's recommendations, the district court ordered the bank to comply with the summonses (*id.* at 25a-26a, 34a-35a).

4. The enforcement orders were stayed pending appeal, and the court of appeals consolidated the cases and reversed by a 2-1 vote (Pet. App. 1a-21a). The court held that the affidavits submitted did not sufficiently demonstrate that the summonses were issued in "good faith" as

required under United States law (see, *e.g.*, *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964)), because the affidavits did not state that the Canadian investigation had not reached a stage analogous to a referral to the Justice Department for a United States tax investigation (Pet. App. 8a-14a). Accordingly, the court ruled that the treaty did not require that the summonses be enforced because of a failure to satisfy the condition that the information sought be information that "the Commissioner is entitled to obtain under the revenue laws of the United States of America" (art. XXI).

The court of appeals characterized the government as arguing that "the good faith doctrine's requirement of a legitimate purpose should not apply to summonses issued at the request of a treaty partner" (Pet. App. 10a). It rejected that view, stating that "the good faith doctrine applies to summonses issued under the treaty" (*id.* at 11a). Specifically, the court stated that one of the elements of good faith for domestic summonses is the prohibition against issuing summonses once the IRS has made a referral to the Justice Department for criminal prosecution. See I.R.C. § 7602(c). The court held that an analogous requirement must be applied to summonses issued at the request of a treaty partner, *i.e.*, that such a summons should not be enforced if the foreign tax investigation "has progressed to a stage analogous to a Justice Department referral" (Pet. App. 11a-12a).

The court acknowledged that the imposition of such an analogous requirement for treaty summonses had been rejected by the Second Circuit in *United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d 47, 49-53 (1983). See Pet. App. 10a-11a. The Second Circuit had held that, in light of the significant differences between the U.S. and foreign legal systems, the legitimate purpose inquiry for treaty summonses should not necessarily apply to the foreign country all of the details of that standard that

apply to the IRS in domestic cases. In particular, the Second Circuit explained that the policy considerations that underlie the prohibition against post-referral summonses—namely, concern about infringing on the role of grand juries and about expanding discovery powers in criminal prosecutions—simply have no relevance to a Canadian investigation of a Canadian citizen with respect to his Canadian tax liabilities. 703 F.2d at 52. The court below did not address these points. It merely stated that it "decline[d] * * * to adopt *Manufacturers & Traders Trust Co.*," noting that the statutory codification of the prohibition on post-referral summonses had eliminated the need to delve into the "institutional good faith" of a foreign government (Pet. App. 11a).[5]

The court of appeals then concluded that the good faith doctrine that it found applicable to treaty summonses had not been satisfied, *i.e.*, the IRS had not shown that the Canadian request for information was made in "good faith." Specifically, the court held that, "in order to establish its prima facie case by affidavit, the IRS must make an affirmative statement that the investigation has not reached a stage analogous to a Justice Department referral" (Pet. App. 13a). The court stated that such a rule was preferable to placing the burden of proof on the taxpayer because the IRS was in the best position to "consult with Canada's competent authority" and "to have greater familiarity with Canadian administrative procedures" (*ibid.*). The court concluded that "it was clear error [for the district court] to find that the affidavits made a prima facie showing of legitimate purpose" (*id.* at 14a).

---

[5] The summons at issue in *Manufacturers* had been issued prior to the effective date of the TEFRA amendments, and therefore the majority opinion in *LaSalle Nat'l Bank* was still the law (see note 2, *supra*).

Judge Wright dissented (Pet. App. 17a-21a). He stated that Director Clancy's affidavit had made a prima facie showing of good faith that was not refuted by respondents. The dissent criticized the majority for "creat[ing] an additional requirement for the good faith showing," namely, the requirement that the IRS affirmatively state that the foreign criminal investigation has not reached a stage analogous to a Justice Department referral (*id.* at 18a-20a). The dissent also stated that the majority had not offered "sound bases" for rejecting *Manufacturers* (*id.* at 19a). It concluded that the decision below "creates an unnecessary intercircuit split, imposes new burdens on the competent authority and meddles unnecessarily in Canadian internal affairs" (*id.* at 17a).[6]

SUMMARY OF ARGUMENT

A. The role of the court in a summons enforcement proceeding is limited to determining whether the IRS issued the summons in "good faith," as delineated in

[6] The dissent also criticized (Pet. App. 20a-21a) the majority's refusal to consider certain supplemental legal materials submitted by the government. In response to questions raised for the first time at oral argument concerning the burden of proof on the referral issue, the government had submitted supplemental case law showing that the taxpayer bears the burden of proof on this issue. The government also had submitted certain foreign law materials showing that Revenue Canada had not yet made the equivalent of a Justice Department referral in this case. The majority refused to consider these materials because the government had failed to seek leave of the court before filing the domestic law materials (see Fed. R. App. P. 28(c) and (j)) and because the court believed that, in fairness to respondents, the foreign law materials should have been submitted no later than in the appellate brief (Pet. App. 14a-15a). The dissent replied that the procedure followed by the government had been used successfully in other treaty interpretation cases, citing *Coplin* v. *United States*, 761 F.2d 688, 691 (Fed. Cir. 1985), aff'd, 479 U.S. 27 (1986), and that respondents could have been afforded an opportunity to respond to any points raised by the foreign law materials.

United States v. *Powell*, 379 U.S. 48, 57-58 (1964). Essentially, this means that the IRS must show that the summons has been issued for a legitimate purpose authorized by Congress. If that showing is made, the summons must be enforced unless the party opposing enforcement rebuts the IRS's showing by demonstrating an improper purpose. When the IRS issues a summons in order to comply with the United States' obligations under the exchange of information provisions of a treaty, it is plainly acting for a legitimate purpose. Accordingly, a summons issued by the IRS based on the competent authority's determination that it is appropriate to honor a treaty partner's request for the summoned information should be enforced in the absence of a showing that the IRS acted with an improper purpose.

The court of appeals seriously erred in holding that a district court is empowered to deny enforcement of a treaty summons on the basis of the court's own conclusion about the good faith of the treaty partner. The treaty establishes the competent authority as the conclusive arbiter of whether the treaty partner's information request is valid under the treaty. For the most part, administration of the treaty is handled exclusively by the respective competent authorities. In particular, when a request for information is made by a treaty partner, the competent authority acts upon it alone; if he determines that the request should be honored, he furnishes the relevant information that is at his disposal to the treaty partner—without involving any other government entity in the process. Nothing in the treaty in any way suggests that the competent authority's determination should be any less conclusive when the IRS must issue a summons in order to obtain the requested information. Hence, the competent authority's determination that a valid request has been made under the treaty is binding on the court in the summons enforcement proceeding; the court can inquire only into whether that determination, and the consequent decision to issue

a summons, were made in good faith. This requirement of deference to the Executive on the administration of tax treaty exchange of information provisions is not unusual; it accords with the manner in which the final responsibility for decisionmaking on particular matters implicating international relations, such as the motivation for an extradition request, is commonly placed in the hands of an officer of the Executive.

Indeed, the inquiry contemplated by the court of appeals exceeds the limited scope authorized by *Powell* because it extends far beyond the question of the good faith of the IRS—the entity that issued and is seeking enforcement of the summons. An inquiry by the court into the circumstances surrounding the treaty partner's request is an improper redetermination of the merits of the IRS's decision to issue the summons, rather than the limited inquiry into its good faith in doing so that *Powell* prescribes. Just like inquiring into the wisdom of the IRS's decision to investigate and therefore issue a domestic summons, second-guessing the correctness of the IRS's decision to honor a treaty request exceeds the limited good faith inquiry that a court enforcing a summons is empowered to make. Because there were no grounds in this case for doubting the IRS's good faith in issuing the summonses, they should have been enforced.

B. There is no basis for the substantive limitation that the court of appeals placed upon the enforcement of a treaty summons—namely, that the foreign tax investigation not have reached a stage analogous to a Justice Department referral. The language of the 1942 Convention cited by the court, limiting the Commissioner's obligation to such information as he "is entitled to obtain under the revenue laws of the United States" (art. XXI), simply establishes that the United States does not violate the treaty when it fails to obtain the requested information because it lacks the power to do so under domestic law—

for example, if the requested documents are privileged. That language does not suggest an intent to impose any further limitations, such as ones derived by analogy to restrictions that apply to the IRS in issuing non-treaty summonses. In particular, the treaty specifies the purposes for which an information request may be made; a referral requirement that essentially would limit those explicitly-stated purposes should not lightly be implied. Moreover, the decision of the court of appeals is contrary to the understanding of both of the parties to the treaty, and the "foreign referral" restriction it imposes would impede the accomplishment of the treaty's primary goal—the exchange of information in order to prevent fiscal evasion. Established canons of treaty construction, therefore, militate against interpreting the 1942 Convention to contain such an implied restriction.

Nor can the court of appeals' decision be defended on the ground that a "foreign referral" restriction arises directly under United States law. Section 7602(c), by its terms, bars the use of the summons power only after there has been a referral for prosecution to the *United States* Department of Justice. There is no basis for reading into that provision a prohibition on the issuance of a treaty summons just because the foreign investigation "has progressed to a stage analogous to a Justice Department referral" (Pet. App. 11a-12a). Both the legislative history of Section 7602(c) and the earlier decision of this Court in *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298, 312-313 (1978), make clear that the only reason for the referral restriction is to prevent use of the summons power "to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation" (*id.* at 312). Plainly, these purely domestic policy considerations are not advanced in the slightest by imposing a "foreign referral" requirement in treaty summons cases, and there is

no reason why Congress should have wanted to impose such a requirement, especially since none of our treaty partners still use the grand jury.

Moreover, the interpretation of the court of appeals is inimical to other important government interests. It would cause United States courts, in some cases, to hamper a foreign country's tax investigation of its own citizens by denying information to that country – without advancing any policy interest of either the United States or the foreign country. Such action likely would not be looked upon kindly by our treaty partner and could lead it to be less cooperative in dealing with requests for information by the United States. The court's holding also runs contrary to the general policy of the treaty to promote the exchange of information.

Even in cases where the court does not ultimately refuse to enforce the summons, the "foreign referral" restriction would undermine the "summary" nature of enforcement proceedings and unnecessarily delay the foreign investigation. By imposing such a restriction, the court of appeals would inject a new and complex issue into summons enforcement proceedings that would provide the party opposing enforcement with an effective means of delaying the receipt of information by the treaty partner. Indeed, the vast differences between our legal system and governmental structure and those of other countries make the task of determining whether there has occurred an analogue to a Justice Department referral not only time-consuming, but virtually impossible in many cases. It is highly implausible that Congress intended to invite an inquiry that would generate such delays when it enacted Section 7602(c), since the primary motivation for that legislation was to eliminate the need for a difficult inquiry into whether the IRS had made an institutional decision to abandon a civil investigation (see *United States* v. *LaSalle Nat'l Bank*, *supra*), which was unnecessarily prolonging summons enforcement proceedings.

C. The court of appeals also erred in placing the burden of proof on the IRS to show the absence of a "foreign referral." Contrary to the court of appeals' suggestion (Pet. App. 13a), both *LaSalle Nat'l Bank* and the legislative history of Section 7602(c) clearly contemplate that, in a domestic summons case, the existence of a Justice Department referral must be shown by the taxpayer in the "rebuttal" stage of the enforcement proceeding. This rule contributes to the expeditious disposition of summons enforcement disputes and should be applied in both domestic and treaty summons cases. Accordingly, even if (contrary to our contention) there were a "foreign referral" restriction, the IRS should not bear the burden of proving the absence of such a referral.

ARGUMENT

AN IRS SUMMONS ISSUED IN FURTHERANCE OF THE UNITED STATES' OBLIGATION TO SATISFY A TREATY PARTNER'S REQUEST FOR INFORMATION DOES NOT HAVE TO BE SUPPORTED BY A DECLARATION THAT THE FOREIGN TAX INVESTIGATION HAS NOT REACHED A STAGE ANALOGOUS TO THE REFERRAL OF A DOMESTIC TAX INVESTIGATION TO THE JUSTICE DEPARTMENT FOR CRIMINAL PROSECUTION

The United States has entered into numerous tax treaties with other nations that provide for the treaty partners to assist each other's tax investigations by means of reciprocal exchanges of information. The decision of the court of appeals severely restricts the ability of the IRS to use its summons power to meet those treaty obligations. The court has imposed upon the IRS a burdensome requirement that has no basis either in the treaty or in any statute, namely, that the IRS declare that the foreign tax investigation has not reached a stage analogous to an IRS

referral to the Justice Department for criminal prosecution. This holding cannot be squared with the court's limited role in summons enforcement proceedings or with the scope of the treaty obligations of the United States. The court's role in a summons enforcement proceeding is limited to determining whether the IRS is seeking the information in good faith for a legitimate purpose; the court has no warrant to conduct an inquiry into the merits or the status of the foreign tax investigation. Rather, the treaty confers upon the Commissioner of Internal Revenue or his delegate the responsibility of conclusively determining whether the treaty partner's request is one that should be honored as falling within the terms of the treaty, and it is the Commissioner's "good faith" that should be the subject of the court's inquiry.

Moreover, the substantive requirement imposed by the court of appeals on the foreign country—namely, that its investigation not have reached a stage analogous to a Justice Department referral—is fundamentally inappropriate. That requirement for domestic summonses is grounded entirely in policies peculiar to the legal system of the United States and that may well be completely irrelevant to practices in the treaty partner's jurisdiction. Indeed, in most countries the inquiry contemplated by the court of appeals would likely be meaningless because their legal systems and governmental organizations are quite different from that of the United States. In short, the holding of the court of appeals has no legal basis, and it would seriously impair cooperation with our tax treaty partners and impede the flow of information under our treaties, without advancing any statutory policy.

A. The IRS's Good Faith Determination that a Treaty Partner's Request for Information Should be Honored under the Terms of a Treaty Constitutes a Legitimate Purpose for the Issuance of a Summons that Justifies its Enforcement Without Any Independent Inquiry by the Court into the Nature of the Treaty Partner's Request

1. *A Court is Obliged to Enforce an IRS Summons that is Issued for a Legitimate Purpose and Otherwise Meets the Criteria of "Good Faith"*

The summons power of the IRS is a broad one, and the role of the courts in an action brought to enforce a summons is limited to determining whether the IRS is abusing its power by attempting to summon documents in circumstances to which Congress did not intend the summons power to extend. The basic inquiry into whether the summons was issued in "good faith" was delineated by this Court in the seminal case of *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964): The Commissioner "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." See also, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 321 (1985); *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 813 n.10 (1984). As the Court stated more succinctly on another occasion, the summons "must be scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose" (*United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975)). The party opposing enforcement may rebut the Commissioner's good faith showing by demonstrating that the IRS issued the summons for an improper purpose, "such as to harass the taxpayer or to put pressure on him to settle a collateral dispute" (*United States* v. *Powell*, 379

U.S. at 58). Failing such a rebuttal, however, as long as the court determines that the summons was issued to obtain information for a legitimate purpose and that the good faith threshold is otherwise satisfied, then the court is obligated to enforce the summons.

The enactment of Section 7602(c), on which the court of appeals relied to deny enforcement of the summonses in this case, did not alter the basic framework of the inquiry described in *Powell*. This Court's decision in *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978), which led to the enactment of Section 7206(c), merely addressed the question whether a summons issued under a particular set of circumstances should be regarded as issued for a "legitimate purpose," *i.e.*, one for which Congress has made the summons power available. The premise of the Court's decision was the assumption that Congress did not intend to authorize the use of a summons solely for the purpose of unearthing evidence of criminal conduct. Accordingly, the Court held that a summons issued after a case had been referred to the Justice Department for criminal prosecution should be regarded as having been issued for an improper purpose. 437 U.S. at 311-313. The Court explained that this limitation on the summons power is designed to safeguard two policy interests—namely, the desire not "to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation" (*id.* at 312). The dissenting Justices agreed with this aspect of the majority's opinion, noting that the " 'only rationale' " for this limitation on the summons power was the conclusion that " 'Congress could not have intended the statute [granting summons authority] to trench on the power of the grand jury or to broaden the Government's right to discovery in a criminal case' " (*id.* at 321 (Stewart, J., dissenting), quoting *United States* v. *Morgan Guaranty Trust Co.*, 572 F.2d 36, 41-42 (2d Cir.), cert. denied, 439

U.S. 822 (1978)). The Court divided on the other aspect of the majority's opinion—its holding that a summons also is issued for an improper purpose if the IRS has "abandon[ed] in an institutional sense * * * the pursuit of civil tax determination or collection" (437 U.S. at 318).

When Congress responded to the decision in *LaSalle Nat'l Bank* by enacting Section 7602(c) to codify the dissenting Justices' view, it similarly did not depart from the general framework of the *Powell* "good faith" inquiry. Indeed, the legislative history reflects that Congress specifically reaffirmed the validity of that inquiry. See 1 S. Rep. 97-494, 97th Cong., 2d Sess. 285, 286 (1982). Congress expressly provided in Section 7602(b) that one of the purposes for which the IRS may issue a summons is to "inquir[e] into any offense connected with the administration or enforcement of the internal revenue laws." But, like the Court, Congress concluded that issuance of a summons after making a referral to the Justice Department would go beyond the purposes for which the summons power had been bestowed upon the IRS; on this point, Congress noted that it did not wish "to broaden the Justice Department's right of criminal discovery or to infringe on the role of the grand jury as a principal tool of criminal prosecution" (1 S. Rep. 97-494, *supra*, at 286). Thus, the enactment of Section 7602(c) did not change the general inquiry for the court in a summons enforcement proceeding from that set forth in *Powell*—whether the IRS issued the summons in good faith in furtherance of a legitimate purpose authorized by Congress. Section 7602(c) does no more than to resolve that question in one specific factual context by providing that a summons should be regarded as issued for an improper purpose if the IRS has already referred the investigation to the Justice Department for criminal prosecution.

2. ***An IRS Summons is for a Legitimate Purpose when it is Issued Pursuant to a Determination by the Competent Authority that it is Appropriate to Honor a Treaty Partner's Request for the Information Sought by the Summons***

a. The 1942 Convention embodies a cooperative effort between the United States and Canada to assist each other in combatting tax evasion. The procedural framework for the exchange of information under the treaty contemplates direct cooperation between the executive agencies that are responsible for the collection of taxes in each country, through designated "competent authorities." For the most part, the Convention contemplates that the competent authorities will implement these provisions autonomously. Thus, the competent authorities are empowered to prescribe regulations to govern information exchanges and to communicate directly with each other for the purpose of administering the Convention (art. XVIII, 56 Stat. 1405). The competent authorities are also required to supply each other on a regular basis with certain specified information concerning income received by residents of one country from sources in the other country (art. XX, 56 Stat. 1405).

Most significantly, the treaty directs the competent authorities to act upon requests for information from the treaty partner, and to supply the requested information when the competent authority concludes that the request is one that should be honored as falling within the treaty, *i.e.*, a bona fide request for information to be used in the determination of tax liability. Article XIX provides that each country agrees to supply to the other "the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws in so far as such information may be of use * * * in the assessment of the taxes to which this Convention relates." Article XIX further provides that this information "may be

exchanged directly between the competent authorities of the two contracting States." Thus, in the case of information at the disposal of the competent authority, it is clear that the treaty contemplates that the competent authority will make a dispositive determination whether the treaty partner's request is one that should be honored. If he concludes that the request is valid, he furnishes the information directly to the treaty partner without involving any other government entity in the process.

There is one aspect of the information exchange provisions, however, that may require judicial action. When the information requested is not at the disposal of the competent authority, the 1942 Convention clearly contemplates that the IRS will issue summonses on some occasions for the sole purpose of obtaining information for the benefit of a treaty partner; as with any other summons, the IRS must seek to enforce that summons in court if the person to whom the summons is directed fails to comply. Article XXI of the Convention states that, when requested by Canada in connection with the determination of a taxpayer's Canadian tax liability, "the Commissioner may * * * furnish the [Canadian] Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America." And Article XIX also obligates each treaty partner to furnish to the other information "which its competent authorities * * * are in a position to obtain under its revenue laws." Thus, when Canada requests information under the treaty that is not in the IRS's possession, and the competent authority determines that the request is one that should be honored under the terms of the treaty, the IRS will act in accordance with the United States' treaty obligations by issuing a summons for that information. Such a treaty summons, even though the information it seeks is intended to be used, not by the IRS, but

by Canada to aid in the investigation of Canadian tax liability, is issued for a "legitimate purpose" authorized by Congress because it is designed to satisfy the United States' obligations under a tax treaty with a foreign nation. See generally *United States* v. *A.L. Burbank & Co.*, 525 F.2d 9 (2d Cir. 1975), cert. denied, 426 U.S. 934 (1976).

When asked to enforce such a summons, the district court's authority, as in the case of a non-treaty summons, is limited to determining whether the summons is issued in "good faith" within the general framework set forth in *Powell*. And, because it is the IRS that has issued the summons and is attempting to invoke the power of the court to enforce the summons, it is the good faith *of the IRS*, not that of the treaty partner, that is the subject of the court's inquiry. As discussed earlier (see pages 15-17, *supra*), the primary focus of the good faith inquiry is whether the summons was issued for a legitimate purpose. That question is answered by the determination of the competent authority that the request for information under the treaty is one that should be honored by the United States. As long as that determination is made by the IRS in good faith, and not for an improper purpose, there is no basis for the district court to refuse to enforce the summons on the ground that it was not issued for a legitimate purpose.[7]

---

[7] If a showing were made in the district court that the competent authority did not act in good faith in making the determination, that could provide a basis for declining to enforce the summons. The court could conclude that the summons was issued, not for the legitimate purpose of complying with the United States' obligation to its treaty partner to satisfy an appropriate request for information under the treaty, but for some improper purpose, "such as to harass the taxpayer or to put pressure on him to settle a collateral dispute" (*United States* v. *Powell*, 379 U.S. at 58). The basis for the court's refusal, however, would be that *the IRS* did not act in good faith in issuing the summons; the court's decision would not be based upon any inquiry into the decisionmaking of the treaty partner.

And if, as was concededly the case here, the other elements of "good faith" under *Powell* are satisfied—that the summoned information is relevant to the legitimate purpose, that the information is not already in the IRS's possession, and that all the administrative steps have been followed—then the summons should be enforced.

The court of appeals' holding that the district court's inquiry into "legitimate purpose" should focus not on the IRS, but rather on the motivations of the foreign tax authorities who made the request under the treaty, is erroneous. In a proceeding to enforce a treaty summons issued by the IRS, the district court should not review de novo the correctness of the IRS's determination that the foreign request is one that is appropriately honored under the treaty, *i.e.*, that the treaty partner's request for information is bona fide and for a valid purpose. As we have seen, the treaty unmistakably contemplates that that determination will be made conclusively by the competent authority when the information is at the disposal of the IRS; nothing in the treaty provides any basis for finding that the competent authority's determination should be any less conclusive when the IRS must issue a summons in order to obtain the requested information. The court of appeals' approach does not respect this aspect of the treaty; moreover, it mistakenly focuses the court's inquiry directly on the "good faith" of the country invoking its treaty rights instead of focusing on the party requesting enforcement of the summons. In so doing, it departs from well-recognized practices in the areas of both summons enforcement and compliance with foreign treaty obligations, and it threatens to inject the judiciary unnecessarily into sensitive areas of foreign relations that should be left to the other branches of government.

b. The necessary corollary to the fact that the district court's inquiry in a summons enforcement proceeding is limited to determining "good faith" is that the court

should not inquire into the merits of some questions that may well be relevant to the administrative decision whether to issue the summons in the first place. For example, the issuance of a summons in a domestic investigation reflects an administrative decision based on many factors that, taken together, have led the IRS to conclude that there is sufficient reason to believe that an investigation may be sufficiently fruitful that the expenditure of resources is justified. Clearly, however, the district court has no authority to second-guess that administrative judgment, and the summons enforcement proceeding does not encompass any inquiry into the strength of the IRS's suspicions that trigger the investigation.

This is true even if the court's inquiry into the wisdom of conducting an investigation could have a fairly narrow focus. For example, in *United States* v. *Powell, supra*, the investigation for which the summoned documents were sought was directed at tax years for which the statute of limitations had expired; therefore, the taxpayer's tax liability would be affected only if he could be proved to have committed fraud (see I.R.C. § 6501(c)(1)). Moreover, because the summons sought a second inspection of records, it could be issued only upon notice to the taxpayer that the Commissioner had found that the additional inspection was "necessary" (I.R.C. § 7605(b)). Nevertheless, the Court held that the summons enforcement proceeding was limited to determining whether the summons had been issued in good faith, and an argument that the Commissioner erred in finding that the additional inspection was "necessary" or that the IRS lacked a sufficient basis to believe that fraud could be proved was not an " 'appropriate ground' " (379 U.S. at 58, quoting *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964)) for challenging enforcement of the summons. 379 U.S. at 57-58.

Under *Powell* and subsequent cases, it is clear that taxpayers may not go behind the face of the summons to challenge the decision of the Commissioner to conduct an investigation. The court asked to enforce a summons should inquire whether the decision to issue the summons is *procedurally* sound—in the sense that the IRS must show that "the administrative steps required by the Code have been followed" (379 U.S. at 58)—but it should not question the *merits* of that decision. For example, if a taxpayer seeks to demonstrate in a summons enforcement proceeding the inaccuracy of the information on which the Commissioner relied in deciding to issue the summons, the court is bound to reject the proffer as irrelevant and to enforce the summons.[8] Similarly, the Commissioner's determination that a treaty partner's request for information should be honored under the treaty is not properly subject to judicial reexamination (except for consideration of the IRS's good faith in making that determination), and

---

[8] The mechanism for enforcing a "John Doe summons" also highlights the limitations of the court's role in a summons enforcement proceeding. Under Section 7609(f), the government can issue such a summons—for records pertaining to an unidentified third party—only after obtaining a court order. That order is issued by a district court in an ex parte proceeding on the basis of government affidavits that demonstrate that the criteria set forth in Section 7609(f) are satisfied. If such a summons is issued and the summoned party refuses to comply, the IRS brings an ordinary summons enforcement suit. In that situation, the courts have rejected efforts by the party opposing enforcement to mount a collateral challenge to the prior ex parte decision authorizing the issuance of the summons. See, *e.g.*, *United States* v. *John G. Mutschler & Assocs.*, 734 F.2d 363, 366-367 (8th Cir. 1984); *Agricultural Asset Management Co.* v. *United States*, 688 F.2d 144, 148-149 (2d Cir. 1982). The courts have explained that the decision to issue the summons cannot be reexamined, even if there is evidence that it was flawed; the district court's role in the enforcement proceeding is limited to conducting the "good faith" inquiry established by *Powell*.

the court in the summons enforcement proceeding should not entertain any challenge to the summons that is based on an independent examination of the treaty partner's request.

c. Preclusion of second-guessing by the district court of the IRS's determination that it is appropriate to issue a summons – beyond the traditional good faith inquiry – is particularly important in the treaty summons context because of the sensitive foreign relations considerations that are implicated in responding to a treaty request. See *INS* v. *Abudu*, No. 86-1128 (Mar. 1, 1988), slip op. 15-16. The conduct of international relations is primarily committed to the Executive Branch, in part because of the importance that the United States speak in such delicate matters with one voice. See, *e.g.*, *Haig* v. *Agee*, 453 U.S. 280, 293-294 (1981); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936). The negotiation of treaties is a major feature of our relations with foreign nations, and that task is exclusively committed to the President (*id.* at 319). Moreover, the fulfillment of responsibilities under treaties can have a profound effect on our relations with other nations, particularly when the issue is whether the United States will recognize an obligation to comply with a treaty partner's request. A finding by a United States court that a treaty request should be refused because the treaty partner did not make the request in "good faith" may well be viewed by our treaty partner as a "serious insult" (*Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 432 (1964)) that will "embarrass" the executive officials in both countries who are primarily responsible for maintaining amicable relations between the countries (see *United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d 47, 53 (2d Cir. 1983)). And, specifically, such disruption of the treaty's implementation could seriously jeopardize the ability of the United States

to persuade its treaty partner to honor that country's reciprocal obligations under the treaty.

In order to minimize such pitfalls, decisionmaking on particular matters implicating international relations is commonly placed in the hands of an officer of the Executive whose exercise of his authority for that purpose is not subject to review by the judiciary. See, *e.g.*, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713-715 (1893); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892). In part, this is because the courts are ill-suited (as well as unauthorized) to make foreign relations judgments. Their focus naturally is on the facts of the case before them and the particular parties involved; the courts are not equipped like the Executive Branch to take into account the myriad interests that must be balanced in pursuing a coherent foreign policy. Cf. *Wang* v. *INS*, 622 F.2d 1341, 1351 (9th Cir. 1980) (Sneed, J. dissenting) (discussing discretionary decisions concerning deportation of aliens), rev'd, 450 U.S. 139 (1981).[9] These concerns apply as well to decisionmaking in the implementation of a treaty, including determination of the appropriateness and validity of another country's request for action under the treaty, and they similarly indicate the need for insulating such decisions by the Executive Branch from second-guessing by the courts. See *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U.S. 470, 489 (1941).

---

[9] Treaties are generally designed to deal with relationships between nations, not to confer rights upon individuals; indeed, treaty provisions frequently cannot be invoked for the enforcement of private rights. See, *e.g.*, *United States* v. *Davis*, 767 F.2d 1025, 1030 (2d Cir. 1985); *Dreyfus* v. *United States*, 534 F.2d 24, 29-30 (2d Cir.), cert. denied, 429 U.S. 835 (1976); Brownlie, *The Place of the Individual in International Law*, 50 Va. L. Rev. 435, 440 (1964).

The manner in which the judiciary's role is often limited in matters involving relations between sovereigns is illustrated in several contexts. The ultimate decision to honor a foreign extradition request is committed to the Executive Branch. Accordingly, in a habeas corpus proceeding challenging extradition, the courts do not "inquire into the procedures which await the relator upon extradition" (*Gallina* v. *Fraser*, 278 F.2d 77, 78 (2d Cir.), cert. denied, 364 U.S. 851 (1960)). See also *Demjanjuk* v. *Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986). Similarly, the courts will not probe the motivations behind a treaty partner's extradition request, for such evaluations "so clearly implicate the conduct of this country's foreign relations as to be a matter better left to the Executive's discretion" (*Eain* v. *Wilkes*, 641 F.2d 504, 516 (7th Cir.), cert. denied, 454 U.S. 894 (1981)). See also 641 F.2d at 518; *Garcia-Guillern* v. *United States*, 450 F.2d 1189, 1192 (5th Cir. 1971), cert. denied, 405 U.S. 989 (1972). See generally Note, *Executive Discretion in Extradition*, 62 Colum. L. Rev. 1313 (1962).

In the analogous situation of extradition from one state to another, once the governor of the asylum state has granted extradition, the courts in the asylum state lack the power to look behind the determination by the judicial officer in the demanding state that there is probable cause to believe that the fugitive has committed a crime. *California* v. *Superior Court*, No. 86-381 (June 9, 1987); *Michigan* v. *Doran*, 439 U.S. 282, 286-290 (1978). And the Executive Branch's determination to allow a claim by a foreign nation of immunity from suit is regarded as a "conclusive determination by the political arm of the Government"; it is not subject to reexamination by the courts. *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943). See also *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. at 427-437; *Compania Espanola de Navigacion Maritima, S.A.* v. *The Navemar*, 303 U.S. 68, 74 (1938). Thus, the

approach taken in the tax treaty—making the competent authority the conclusive decisionmaker on the question whether a request for information should be honored under the treaty—is fully consonant with the traditional approach to determinations that can have major implications upon foreign relations.

In sum, the court of appeals erred in holding that the district court, in a proceeding to enforce a treaty summons, should embark on an inquiry into the merits of the foreign tax investigation or the good faith of the foreign country. Established principles of summons enforcement law indicate that the court's inquiry should be limited to the good faith of the entity issuing the summons, *i.e.*, the IRS. Conversely, the strength of the reasons for the IRS's good faith decision to issue the summons—here, its conclusion that the summonses were necessary to comply with a valid treaty request—is not an appropriate ground for inquiry. More particularly, the treaty itself does not contemplate that the district court shall be the final arbiter of the validity of a foreign government's request for information under the treaty; on the contrary, the treaty confers upon the "competent authority" the responsibility to receive and weigh the request and decide whether it is appropriate for the United States to obtain the requested information. This allocation of responsibility furthers the sound administration of foreign policy. For the district court to second-guess the competent authority's determination and take upon itself the power to declare that a foreign country did not act in good faith in requesting information under the treaty would inject the court into delicate matters of international relations that are traditionally the province of the Executive and are beyond the scope of the court's expertise. The competent authority's determination that the foreign country's request for the summoned information should be honored under the

treaty provides a legitimate purpose for the IRS's issuance of the summons that justifies its enforcement.[10]

3. *The District Court Correctly Enforced the Summonses Based upon the Showing Made by the Competent Authority in this Case*

When the correct principles governing the scope of a proceeding to enforce a treaty summons are applied, it is clear that the district court in this case correctly enforced the summonses. The affidavits submitted by the competent authority here (see J.A. 27-29) stated that he had decided to honor the Canadian treaty requests because the requested information may be relevant in determining respondents' tax liability and the same type of information can be obtained by Canadian tax authorities under Canadian law. The affidavits further stated that the information requested was not already in the hands of the IRS, and therefore the issuance of summonses was necessary to obtain that information. Thus, the affidavits demonstrated that the summonses were issued by the IRS for a legitimate purpose—to comply with what the competent authority found to be a valid treaty request—and that the other elements of the *Powell* good faith inquiry had been met.

---

[10] Some of the problems inherent in allowing the enforcing court to investigate the good faith of the treaty partner's request are illustrated by a recent decision in another treaty summons case (*Kerry F.B. Packer* v. *United States*, Civil No. C2-87-1285 (S.D. Ohio July 6, 1988)). The IRS issued a summons to obtain information requested by the Australian Tax Commission pursuant to our tax treaty with Australia. The court erroneously refused to enforce the summons, pending an evidentiary hearing into "whether Australia's request for the records in question was in fact accompanied by a proper or legitimate purpose" (slip op. 4). To that end, the proceedings were held in abeyance to allow the taxpayer to seek discovery from an Australian tax official by means of a letter rogatory.

Respondents did not rebut this showing that the IRS acted in good faith in issuing the summonses; indeed, respondents did not even allege that the summonses were issued for an improper purpose, such as to harass them or to put pressure on them to settle a collateral dispute with the IRS. Moreover, there certainly was no reason to doubt on its face the IRS's determination that Canada's request for information was a valid one under the treaty. The information sought, the bank's records of its transactions with certain customers, plainly was information that "the Commissioner is entitled to obtain under the revenue laws of the United States" (art. XXI). Indeed, the legislative history of the 1942 Convention shows that the United States and Canada specifically contemplated the issuance of summonses for bank records at the request of the treaty partner. See 88 Cong. Rec. 4714 (1942).[11] The summoned information was not privileged, nor was there any other basis for the bank to withhold it in the face of valid summonses. In short, there was no basis on which the court

---

[11] The following colloquy took place on the floor of the Senate during the debate on ratification of the 1942 Convention (88 Cong. Rec. 4714 (1942)):

> Mr. Taft. In other words, if an American citizen were using a Canadian bank deposit to evade income taxation, I think the [treaty] would permit the United States Government to ask the Canadian Government to obtain information from its own bank and furnish it to this Government in connection with the enforcement of our internal-revenue laws.
>
> Mr. George. It does provide for exchange of information, as the Senator from Ohio points out.

See also *United States* v. *A.L. Burbank & Co.*, 525 F.2d at 17 n.7. The same view is expressed in a letter from the Acting Secretary of State that accompanied the Convention when it was presented to the Senate for ratification. S. Exec. Doc. B, 77th Cong., 2d Sess. 1, 2, 4-5 (1942), *reprinted in* Joint Comm. on Int. Rev. Tax., 77th Cong., 2d Sess., 1 *Legislative History of United States Tax Conventions* 445, 448-449 (1962).

could have concluded that the summonses in this case were an abuse of the summons power, and they should have been enforced.

B. Evidence that a Foreign Tax Investigation has not Reached a Stage Analogous to a Justice Department Referral is not a Prerequisite to Issuance of a Summons to Honor a Treaty Partner's Request for Information

Quite apart from its error in approving judicial reexamination of the competent authority's determination to honor the treaty partner's request for information, the court of appeals also erred in the substantive standard that it applied to the foreign tax investigation in determining whether the treaty summonses were enforceable. The court held that the summonses could not be enforced unless the IRS showed that the treaty partner's investigation had not advanced to a point analogous to a Justice Department referral (Pet. App. 11a-12a), but neither the treaty nor the relevant statute provides any basis for finding such a restriction. Indeed, there is no policy rationale whatever for the imposition of this "foreign referral" restriction. It would, moreover, seriously interfere with the United States' ability to comply expeditiously with its treaty obligations to summon information needed by a treaty partner for a tax investigation. Since the absence of an analogous "foreign referral" simply is nowhere specified as a prerequisite to honoring a treaty partner's request for information, the IRS is not required to inquire into the stage that the foreign investigation has reached before determining either to furnish the treaty partner information already known to the IRS or to issue a treaty summons. It follows, *a fortiori*, that the court cannot refuse to enforce such a summons on the ground that a foreign analogue to a Justice Department referral has, or may have, occurred.

1. The court of appeals appears to have rested its decision on the language in the 1942 Convention that limits the United States' obligation to obtain information for Canada to such information "as the Commissioner is entitled to obtain under the revenue laws of the United States of America" (art. XXI). See Pet. App. 10a-11a. This language establishes that the United States does not violate the treaty when it fails to obtain the requested information because it lacks the power to do so under United States law. For example, information that is protected from being summoned because it is subject to a privilege, such as the attorney-client privilege or the privilege against self-incrimination, or information that could be obtained only through a violation of the Fourth Amendment clearly need not be furnished to Canada under the terms of the treaty. Moreover, we may assume for purposes of argument that the terms of Section 7602(c) might bar enforcement of a treaty summons when there had been in effect an IRS referral to the *United States* Department of Justice with respect to the same taxpayer. But there is no basis for reading the language of the treaty to impose limitations on supplying information to Canada that are not directly contained in United States law, but are derived only by analogy to restrictions that apply to the IRS in issuing non-treaty summonses.

The court of appeals' imputation into the language of the 1942 Convention of a restriction on treaty summonses is particularly inappropriate with respect to the specific restriction involved in this case – the prohibition in Section 7602(c) against the issuance by the IRS of a summons after there has been a referral to the Justice Department for criminal prosecution. That prohibition is essentially a limitation on the purposes for which the IRS can invoke the summons power (though the purpose inquiry is resolved by a bright-line rule based on the stage that the investigation has reached). But there is no basis for applying that restriction to Canada (or to any other treaty partner).

The treaty itself explicitly describes the purposes for which Canada can request information under its provisions – for "use * * * in the assessment of the taxes to which this Convention relates" (art. XIX) or when the Minister deems it necessary to obtain the information "in the determination of the income tax liability of any person under any of the revenue laws of Canada" (art. XXI). Only a distorted interpretation of the treaty would modify and limit these explicit provisions regarding allowable purposes on the basis of a provision that merely declares that the United States is not obligated to furnish information that it lacks the power to obtain.

Fundamental principles regarding the construction of treaties further confirm the error of the court of appeals' interpretation. The role of a court interpreting international agreements is "limited to giving effect to the intent of the Treaty parties" (*Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982)). When a dispute about the meaning of a treaty provision arises, there are several principles of interpretation that have been repeatedly recognized as useful in determining the intent of the parties. A treaty generally is to be "construe[d] * * * liberally to give effect to the purpose which animates it" (*Bacardi Corp.* v. *Domenech*, 311 U.S. 150, 163 (1940)). See also *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, No. 86-1052 (June 15, 1988), slip op. 5; *Factor* v. *Laubenheimer*, 290 U.S. 276, 293-294 (1933); *Nielsen* v. *Johnson*, 279 U.S. 47, 52 (1929); *Rocca* v. *Thompson*, 223 U.S. 317, 331-332 (1912). The practice of the two states under the treaty is considered strong evidence of the correct interpretation. *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 259 (1984); *Factor* v. *Laubenheimer*, 290 U.S. at 294-295; see also *Air France* v. *Saks*, 470 U.S. 392, 404-405 (1985). And the construction of the treaty by the Executive Branch is entitled to "great weight" in assessing the intention of the contracting states.

Sumitomo Shoji America, Inc. v. *Avagliano*, 457 U.S. at 184-185; *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961).

These canons of construction all counsel rejection of the court of appeals' interpretation. The manifest purpose of the treaty provisions involved here is to provide for unfettered exchange of information between the two nations in order to assist the treaty partner's conduct of its tax investigations. This cooperation is designed to serve the treaty's more general goal of "prevent[ing] fiscal evasion" (art. XIX). See *United States* v. *A.L. Burbank & Co.*, 525 F.2d at 13. Plainly, the interpretation of the court of appeals, in imposing an additional (unexpressed) restriction on the enforcement of treaty summonses that will inhibit the flow of relevant information from the United States to Canada, serves to impede and retard the accomplishment of the treaty's general purposes. Therefore, that interpretation should not be adopted in the absence of some compelling evidence that it reflects the intention of the parties. See *Bacardi Corp.* v. *Domenech*, 311 U.S. at 163 ("Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred."); see also *United States* v. *Davis*, 767 F.2d 1025, 1031 (2d Cir. 1985) (stating reluctance "to erect unnecessary procedural obstacles in the path of international judicial assistance"). Moreover, the court of appeals' reading of the treaty is at odds with the interpretation of the executive agency responsible for its negotiation and administration, and it is contrary to the consistent practice of both Canada and the United States in operating under the 1942 Convention. See *United States* v. *Manufacturers & Traders Trust Co.*, *supra*. In sum, the court of appeals' reading of the treaty to include a "foreign referral" restriction, by analogy to Section 7602(c) of the Code, is wholly without foundation.

2. If, as we have shown, a "foreign referral" restriction upon the enforcement of a treaty summons does not arise from the treaty itself, the court of appeals' holding is defensible only if such a restriction arises directly under United States law. But there simply is no such restriction in the Code. Section 7602(c), by its terms, does not impose a "foreign referral" restriction. Section 7602(c)(1) expressly limits the IRS's authority to issue a summons with respect to a person when "a Justice Department referral is in effect with respect to such person." And Section 7602(c)(2) defines in copious detail the phrase "Justice Department referral is in effect"; that definition refers only to the operations of the United States Justice Department and does not, by its terms, purport to apply to foreign governments. The court of appeals' imposition of a "foreign referral" restriction thus can be upheld only if the term "Justice Department referral" is read to cover, not only the circumstances described in its detailed statutory definition, but also an analogous stage of a foreign tax investigation in treaty summons cases. Such an expanded definition is not proper as a matter of statutory interpretation—particularly where, as here, it is without support in the legislative history or purpose.

The legislative purpose underlying Section 7602(c) in no way suggests that Congress intended to establish as a prerequisite to the enforcement of a treaty summons the requirement that the foreign tax investigation not have reached a stage analogous to a Justice Department referral. As we have noted (page 17, *supra*), the legislative history of Section 7602(c), which codified the Justice Department referral restriction on which the Court unanimously agreed in *LaSalle Nat'l Bank*, indicates that Congress intended to promote the same policies identified by the Court in its decision—namely, to avoid expanding "criminal discovery or * * * infring[ing] on the role of the grand jury as a principal tool of criminal prosecution" (1 S. Rep. 97-494, *supra*, at 286). These considerations are tied

directly to the structure of the law enforcement system of the United States and therefore bear no relevance to the enforcement of treaty summonses, where the proposed inquiry would be into the status of the foreign tax investigation.

The fundamental irrelevance of the referral inquiry in the treaty summons area is made clear by the Court's detailed discussion in *LaSalle Nat'l Bank* of the rationale for the Justice Department referral limitation in domestic summons cases. 437 U.S. at 312-313. The Court explained that the limitation derives from the division of authority in our system for the conduct of criminal investigations and prosecutions. In this country, the Court noted, the grand jury has been established as the "principal tool of criminal accusation," and "criminal discovery" is limited. The Court found that Congress did not intend that the summons power be used to alter this framework, and Congress confirmed this conclusion when it enacted Section 7602(c). Because of corresponding divisions of authority in the Executive Branch, the Court concluded in *LaSalle Nat'l Bank* that permitting the issuance of a summons after a Justice Department referral had been made would create a "substantial" "likelihood that discovery would be broadened or the role of the grand jury infringed." The Court explained that the IRS has no power to bring a prosecution, but instead must refer a case to the Justice Department for that purpose; moreover, a referral also deprives the IRS of its ability to compromise both the criminal and civil aspects of a fraud case. Therefore, the Court concluded, once a referral has occurred, the degree of necessary information exchange between the two agencies would be such that IRS use of summoned information to determine civil liability "would inevitably result in criminal discovery." In sum, the Court held that a prohibition on the issuance of a summons after a Justice Department referral was necessary as a "prophylactic" measure to prevent infringement of the

grand jury's principal investigative role and our legal system's limitations on criminal discovery. See also 437 U.S. at 320-321 (Stewart, J., dissenting).[12]

Plainly, these domestic policy considerations are not advanced in the slightest by imposing a "foreign referral" requirement in treaty summons cases. These policies are "wholly internal—related solely to prosecution in this country, to our division of governmental functions, to our continued use of the grand jury in federal criminal matters, and to our position on pre-trial discovery in our criminal cases" (*United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d at 52). When a summons issued at the request of a treaty partner is enforced, these policies are not affected; regardless of the status of the foreign tax investigation, there is no encroachment upon the function of the institution of the grand jury in this country nor is there an expansion of the Justice Department's discovery power. In accordance with our treaty obligations, the information is simply provided to a foreign government, which uses it for its own domestic purposes in accordance with its own laws.

Nor do Canadian taxpayers who use banks in this country have any right to expect that the restrictions afforded against criminal discovery by this country will apply to them in connection with a Canadian investigation of their

[12] To the extent that the Court's decision in *LaSalle Nat'l Bank* went beyond a bright-line limitation grounded in a Justice Department referral, it was rejected by Congress when it enacted Section 7602(c). Congress at that time also rejected the suggestion in the majority opinion (see 437 U.S. at 316) that assisting a criminal investigation is not a legitimate purpose for the issuance of a summons. Section 7602(b) provides that the purposes for which the IRS may issue a summons "include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws." See 1 S. Rep. 97-494, *supra*, at 286.

Canadian tax liabilities. "The United States has no interest in thrusting its policy (in this regard) into Canadian prosecutions, [and] Canada has no interest in having that policy applied to its taxpayers" (*United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d at 52). The referral limitation of Section 7602(c) was designed to advance domestic policies that apply to investigations by the United States government, and there is no reason to expand its application beyond its plain terms to impose an analogous restriction on foreign tax investigations.

Indeed, even in the unlikely event that Congress had some interest in affecting the conduct of foreign tax investigations, it would be illogical for it to attempt to export the domestic policy considerations that underlie Section 7602(c) by imposing an analogous "foreign referral" restriction. As the Second Circuit stated in *Manufacturers*, these policy considerations are peculiar to our law enforcement system and are "not applicable to Canada which does not have our marked separations and does not normally use the grand jury" (703 F.2d at 52). Indeed, the grand jury is no longer used at all in Canada. See 2 R.S.C. ch. 34, §§ 506, 507 (1970), as amended by the Criminal Law Amendment Act, 1985, ch. 19, §§ 114, 115; *Re McKibbon and the Queen*, 6 D.L.R. (4th) 1, 20-35 (1984); *id.* at 5 (Dickson, J., dissenting).[13] Canada is by no means unusual in this respect; none of the 34 tax treaty partners with which the United States exchanges information (see

[13] In our petition (at 13), we mistakenly stated that the grand jury was still in use in limited circumstances in Nova Scotia. That was true for a period subsequent to the Second Circuit's decision in *Manufacturers*, but Nova Scotia abolished the grand jury in August 1984. See An Act to Amend Chapter 12 of the Acts of 1969, the Juries Act § 2, proclaimed in Nova Scotia in 1984.

note 17, *infra*), uses the grand jury in its criminal justice system.[14]

Nor does Canada have a policy like that of the United States respecting criminal discovery that requires a separation between civil and criminal investigations akin to that triggered by a Justice Department referral in this country. The Canadian system pervasively allows information to be shared between officials interested in civil liability and those concerned with criminal prosecution; Section 241(4) of the Canadian Income Tax Act, 5 Can. Tax Rep. (CCH) ¶ 27,742 (1987) provides that, for any purpose related to the revenue, the Minister may disclose to any authorized person of the Canadian government any material obtained by him in the course of his investigation. See also *United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d at 51. Thus, the policies that underlie the limitation in Section 7602(c) on issuing summonses after a Justice Department referral simply have no application in Canada and provide no basis for the rule adopted by the court below reading a "foreign referral" restriction into the statute.[15]

---

[14] The grand jury is an institution of Common Law systems, whose beginnings in England are traced back to 1166. See generally G. Edwards, Jr., *The Grand Jury* 1-44 (1906); R. Younger, *The People's Panel* 1-4 (1963). Although the institution of the grand jury is constitutionally guaranteed in the United States by the Fifth Amendment, it has been abolished, as in Canada, by our other tax treaty partners having Common Law systems: (1) the United Kingdom (see R. Younger, *supra*, at 224-226); (2) Australia (see *Saywell* v. *Attorney-General*, [1982] 2 N.Z.L.R. 97); (3) Ireland (see *State* v. *O'Malley*, [1978] I.R. 269); (4) Jamaica (see *Grant* v. *Director of Public Prosecutions*, [1982] App. Cas. 190); and (5) New Zealand (see *Saywell* v. *Attorney-General*, *supra*).

[15] Of course, if the use of the summoned information by Canada does violate some Canadian law or policy, respondents are free to invoke their own domestic law to raise an objection in a Canadian proceeding.

3. The interpretation of the court of appeals not only does not advance any discernible policy goal, it actually is inimical to important public interests. Imposing a "foreign referral" requirement would impede the United States' ability to comply with treaty requests because it would require the competent authority to make additional findings relating to the nature and status of the foreign tax investigation that go well beyond what has been required until now. Compare *United States* v. *Bache Halsey Stuart, Inc.*, 563 F. Supp. 898, 900 (S.D.N.Y. 1982). Even more serious delays would be introduced at the enforcement stage since the court would be required to decide a new and complex issue in an adversary setting, providing the party opposing enforcement with an effective means of delaying the receipt of information by the treaty partner. Thus, the court of appeals' holding would seriously undermine the well established rule that summons enforcement proceedings should be "summary" in nature so as not unduly to delay investigations (see *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971); *United States* v. *Kis*, 658 F.2d 526, 535-536 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Davis*, 636 F.2d 1028, 1038 (5th Cir.), cert. denied, 454 U.S. 862 (1981)). See *Michigan* v. *Doran*, 439 U.S. at 288 (limiting scope of inquiry at state extradition hearing because it is designed to be "summary"). As Judge Wright noted below in dissent, the court of appeals' decision "will *increase* rather than decrease enforcement litigation because the courts will have to determine ultimately exactly what kinds of [foreign] investigations are 'analogous' to a Justice Department referral" (Pet. App. 20a (emphasis in original)).

It is clear that Congress, in enacting Section 7602(c), did not intend to create this additional obstacle to prompt enforcement of treaty summonses. The primary motivation

for the enactment of that section was to alleviate delays in summons enforcement. Congress was concerned that the Court's decision in *LaSalle Nat'l Bank* had led to time-consuming litigation over the question whether the IRS as an institution had abandoned the pursuit of civil tax liability; the legislative history explains that *LaSalle Nat'l Bank* had spawned "protracted litigation" that was interfering with the principle that "summons enforcement proceedings should be summary in nature" (1 S. Rep. 97-494, *supra,* at 285). To eliminate that wasteful litigation, Congress adopted a bright-line rule in Section 7602(c) keyed to the existence of a Justice Department referral. It is highly implausible that Congress, while it was streamlining enforcement proceedings by eliminating the difficult inquiry into the IRS's "institutional" abandonment of a civil inquiry, at the same time required by implication an even more difficult inquiry in treaty summons cases into whether a foreign analogue to a Justice Department referral has occurred—an inquiry that is bound to interfere substantially with the summary nature of proceedings to enforce such summonses.

Indeed, it is something of an understatement to describe the inquiry required by the court of appeals as complex or difficult; given the substantial differences between our legal system and governmental structure and those of other countries, determining whether a treaty partner has made the equivalent of a Justice Department referral is highly impracticable. Legal systems throughout the world are highly diverse; for example, one authority classifies the various legal systems of the world into eight distinct families, and some countries have legal systems that are hybrids of one or more of these families. See 1 K. Zweigert and H. Kotz, *An Introduction to Comparative Law* 57-67

(1977).[16] The United States has income tax conventions with countries from seven of these groups and is negotiating with a country from the eighth.[17]

The mere existence of this diversity makes the inquiry contemplated by the court of appeals a daunting task. That task is further complicated by the fact that a particular legal system may not always be completely defined by the "books"; there are often "unwritten rules" that "in practice supersede or bypass rules of law fixed by the legislature or the judiciary" (1 K. Zweigert and H. Kotz, *supra,* at 29). And, significantly, the governmental structure that is established to administer these diverse systems will generally be quite different from that of the United States. In particular, there is no reason to assume that the ministry of justice of a given treaty partner will be responsible for the prosecution of tax offenses.[18] If not, it is difficult to see how the search for a foreign analogue to a

---

[16] These families are the: (1) Romanistic family; (2) Germanic family; (3) Nordic family; (4) Common Law family; (5) Socialist family; (6) Far Eastern systems; (7) Islamic systems; and (8) Hindu law. 1 K. Zweigert and H. Kotz, *supra,* at 67.

[17] The United States has in force income tax conventions containing exchange of information provisions with the following 34 countries: Australia, Austria, Barbados, Belgium, Canada, Cyprus, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Korea, Luxembourg, Malta, Morocco, Netherlands, New Zealand, Norway, Pakistan, People's Republic of China, Philippines, Poland, Romania, Sweden, Switzerland, Trinidad and Tobago, and the United Kingdom. 17 Tax Mgmt. Int'l J. 225 (1988). The United States is conducting negotiations with India (*id.* at 226), which falls into the Hindu law family (see 1 K. Zweigert and H. Kotz, *supra,* at 374-380).

[18] Civil Law countries typically divide the administration of their laws into three categories: private or "substantive" civil law; criminal law; and administrative law. See generally G. Glos, *Comparative Law* 5-32 (1979). Civil Law countries have a separate court system dedicated solely to adjudicating "administrative law," into which tax

Justice Department referral can meaningfully be performed. Thus, the court of appeals' directive to find an analogy in other legal systems to a concept that is unique to the legal system and governmental structure of the United States is virtually impossible to satisfy in the case of some of our treaty partners.

Finally, the restriction adopted by the court of appeals would undermine the general purposes of the treaty and threaten interference with the conduct of our foreign relations. As the Second Circuit pointed out in *Manufacturers,* Canada, or another treaty partner, is not likely to look kindly upon a decision by a United States court refusing to enforce a treaty summons because of a "foreign referral" restriction (703 F.2d at 52-53):

> Since the need was Canada's alone, and use of the information was to be made only there, Canada might consider it a failure on this country's part to comply with the treaty's commitment if enforcement of the summonses were refused on grounds Canada does not recognize in its own territory or with respect to its own income taxes. Canada might wonder what concern the United States has in applying its internal policy to a case in which this country's taxes and citizens are not at all involved—only Canada's.

Moreover, as we have noted (page 33, *supra*), the restriction imposed by the court of appeals plainly serves to retard the accomplishment of the treaty's basic goal of enhancing the free flow of information with a view towards reducing fiscal evasion. Straining the language of the statute to find such a restriction is at odds with the

---

matters usually fall (*id.* at 24-28). For example, in some Cantons of Switzerland "tax fraud," the most severe tax offense, is prosecuted in the administrative court system rather than in the criminal courts. See W. Meier, *Banking Secrecy in Swiss and International Taxation,* 7 Int'l Law. 26 (1973).

general principle that domestic law should be interpreted, if possible, to avoid restricting the scope of a preexisting treaty provision. See *United States* v. *Lee Yen Tai,* 185 U.S. 213, 222 (1902); see also I.R.C. § 7852(d).[19] In short, there is no basis for interpreting Section 7602(c) to require, in a treaty summons case, an inquiry into whether the foreign investigation has reached a stage analogous to a Justice Department referral.

C. The Court of Appeals Erred in Placing upon the Government the Burden of Showing the Absence of a "Foreign Referral"

Even if we assume arguendo that the court of appeals was correct in holding that enforcement of a treaty summons should be denied if the foreign investigation has reached a stage analogous to a Justice Department referral, the court erred in placing upon the government the burden of showing that the investigation has not reached that stage. The court stated that the IRS was in the best position to make this determination because it could be expected to be more familiar with Canadian procedures than the taxpayer (Pet. App. 13a). The court also appeared to rely upon the premise that the IRS would be required in a domestic summons case to establish, as part of its prima facie case for enforcement, that a Justice Department referral is not in effect (see *ibid.*). This premise is erroneous. The IRS is not required to demonstrate, as part of its prima facie case for enforcement, the absence of a Justice Department referral in a domestic case; hence, it

---

[19] Section 7852(d) of the Code provides that "[n]o provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of the enactment of this title." See *Manufacturers & Traders Trust Co.,* 703 F.2d at 53; see also *United States* v. *A.L. Burbank & Co.,* 525 F.2d at 14.

should not be required to show the absence of a "foreign referral" in a treaty summons case.

To obtain enforcement of a domestic summons, the government bears the burden of showing that the requirements of *United States* v. *Powell, supra,* are met—namely, that the summons authority is being invoked in good faith for a legitimate purpose authorized by the Code. This is ordinarily accomplished by means of an affidavit of the agent issuing the summons stating that the *Powell* requirements are satisfied. The courts have recognized that the burden of making this prima facie showing is a "slight one," but have explained that this procedure is appropriate in order that the enforcement powers of the IRS not be unduly restricted. Once the IRS has made this prima facie showing of good faith, the burden, described as a "heavy one," shifts to the taxpayer to demonstrate that the summons was issued for an improper purpose. See, *e.g., United States* v. *Balanced Financial Management, Inc.*, 769 F.2d 1440, 1443-1445 (10th Cir. 1985); *United States* v. *Kis,* 658 F.2d at 535-536; *United States* v. *Garden State Nat'l Bank,* 607 F.2d 61, 70-71 (3d Cir. 1979).

This Court's opinion in *LaSalle Nat'l Bank* explicitly answered the question whether the IRS must show the absence of a Justice Department referral as part of its prima facie case, or, conversely, whether the taxpayer must show the existence of a referral to rebut the prima facie case for enforcement. In holding that a summons should not be enforced if a Justice Department referral has been made, the Court stated that the person opposing enforcement bore the "heavy" burden "to disprove the actual existence of a valid civil tax examination or collection purpose" (437 U.S. at 316). The lower courts followed the plain import of this language and recognized that the claim that a summons should not be enforced for failure

to satisfy *LaSalle Nat'l Bank* was to be resolved at the "rebuttal" stage of the enforcement proceeding. Once the government had established by submission of the agent's affidavit that the basic *Powell* factors were satisfied, it was left to the person opposing enforcement to disprove the existence of a valid civil tax purpose by showing that there had been a Justice Department referral or an institutional decision by the IRS to abandon the pursuit of civil tax liability. See, *e.g., United States* v. *Kis,* 658 F.2d at 538-539, 541; *United States* v. *Garden State Nat'l Bank,* 607 F.2d at 68.

When Congress codified in Section 7602(c) the referral restriction set forth in *LaSalle Nat'l Bank,* it did not purport to disturb the allocation of the burden of proof that the Court had made. To the contrary, the legislative history clearly shows that Congress considered the issue and affirmatively decided that the burden of showing a Justice Department referral should be on the party opposing enforcement and therefore that demonstrating the absence of such a referral is not an element of the IRS's prima facie case. The Senate Report states (1 S. Rep. 97-494, *supra,* at 283 (emphasis added)):

> [T]he Secretary will have to meet all the requirements of *United States* v. *Powell,* 379 U.S. 48 (1964), including a showing that the individual investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that all the administrative steps required by the Code have been followed. *As a defense to the enforcement of the summons,* the taxpayer may show that the taxpayer's case has been referred to the Department of Justice * * *.

Thus, the conclusion is inescapable that Congress intended the Justice Department referral restriction of Section

7602(c) to be a taxpayer defense, rather than an element of the prima facie showing to be made by the IRS. Accord *Pickel* v. *United States,* 746 F.2d 176, 184 (3d Cir. 1984) ("[t]he Pickels, as the parties opposing the summonses, bore the burden of showing * * * that a Justice Department referral had taken place"); *United States* v. *Naden,* 57 A.F.T.R.2d (P-H) ¶ 86-632 (E.D. Cal. 1986); *Driggers* v. *United States,* 86-1 U.S. Tax Cas. (CCH) ¶ 9479 (W.D. Pa. 1986).

The court of appeals' decision is also wrong as a matter of sound summons enforcement policy. Placing the burden of proof on the IRS to show the absence of a referral would interfere with the "summary" nature of summons enforcement proceedings (*Donaldson* v. *United States,* 400 U.S. at 529), which is a critical feature of the enforcement structure that guards against government abuse of the summons power, while keeping disruption of the IRS's legitimate investigative activities to a minimum. Under the court of appeals' approach, the IRS would have to determine in every case that no Justice Department referral was in effect before applying for enforcement of a summons. That inquiry may be time-consuming and quite wasteful in the vast majority of cases where there is no basis for suspecting that a referral is in effect.[20] Under the

[20] It is true, as the court of appeals observed (Pet. App. 13a), that in some cases government affidavits do disclose referral status. These ordinarily are cases where the absence of a referral is known to the agent, and therefore no expenditure of time or resouces is required to disclose referral status in the affidavit. But that does not mean that the government is under any legal obligation to make a showing that no referral is in effect – a showing that would be quite burdensome in some cases. While it is ordinarily not difficult or time-consuming for the IRS to ascertain whether it has initiated a Justice Department referral (see I.R.C. § 7602(c)(2)(A)(i)), the statute also provides that a "Justice Department referral" is in effect when there has been a request by Justice for return information from the IRS pursuant to

approach reflected in *LaSalle Nat'l Bank* and in the legislative history of Section 7206(c), on the other hand, an inquiry into referral status will have to be made only in that limited number of cases in which there is some basis for believing that a referral may be in effect. And, of course, the deleterious effects of the burden of proof proposed by the court of appeals for domestic summonses are magnified in the treaty summons area because of the exceedingly complex nature of the inquiry into whether an analogous "foreign referral" has occurred. Accordingly, the IRS should not be required to demonstrate the absence of a referral for criminal prosecution as part of its prima facie case for enforcement; any objection to a summons on the ground that a referral is in effect must be made by the taxpayer as part of the "rebuttal" stage of the proceeding, in accordance with the clear intent of Congress.

More fundamentally, however, for the reasons we have explained, any such objection in a treaty summons case, based on the status of the treaty partner's investigation, is, in any event, entirely irrelevant to whether the summons should be enforced – and therefore not a proper subject of inquiry in the enforcement proceeding.

I.R.C. § 6103(h)(3)(B). See I.R.C. § 7602(c)(2)(A)(ii). It is often quite difficult for the agent issuing the summons to determine whether there has been such a "reverse referral" in a given case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
ALAN I. HOROWITZ
Assistant to the Solicitor General
CHARLES E. BROOKHART
JOHN A. DUDECK, JR.
Attorneys

JULY 1988

APPENDIX

Articles XIX and XXI of the Convention Respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1405-1406 provide:

ARTICLE XIX

With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws in so far as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates.

The information to be furnished under the first paragraph of this Article, whether in the ordinary course or on request, may be exchanged directly between the competent authorities of the two contracting States.

ARTICLE XXI

1. If the Minister in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner, the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America.

2. If the Commissioner in the determination of the income tax liability of any person under any of the revenue laws of the United States of America deems it necessary to secure the cooperation of the Minister, the Minister may, upon request, furnish the Commissioner such information bearing upon the matter as the Minister is entitled to obtain under the revenue laws of Canada.

Section 7602 of the Internal Revenue Code, 26 U.S.C. 7602 provides:

Examination of books and witnesses

(a) Authority to summon, etc.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized –

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense

The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense con-

nected with the administration or enforcement of the internal revenue laws.

(c) No administrative summons when there is Justice Department referral

(1) Limitation of authority

No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect

For purposes of this subsection –

(A) In general

A Justice Department referral is in effect with respect to any person if –

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination

A Justice Department referral shall cease to be in effect with respect to a person when –

(i) the Attorney General notifies the Secretary, in writing, that –

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately

For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 202-037/60557